United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

74-2249

To be argued by
PAUL B. BERGMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2249

UNITED STATES OF AMERICA,

Appellee,

—against—

HUMBERTO FLORES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Eastern District of New York.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2249

UNITED STATES OF AMERICA,

Appellee,

—against—

HUMBERTO FLORES,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Humberto Flores appeals from a judgment of the United States District Court for the Eastern District of New York (Costantino, *J.*) entered October 21, 1974, which judgment convicted appellant, following a jury trial, of (1) importing 2.2 kilograms of cocaine into the United States in violation of Title 21, United States Code, §§ 952(a) and 960(a)(1), and (2) conspiracy to import cocaine in violation of Title 21, United States Code, Sections 952(c) and 963. Appellant was sentenced to concurrent prison terms of eight years on each count, and to a special parole term of five years. He is currently incarcerated at the Lewisburg Federal Penitentiary.

The judgment herein is the second judgment of conviction in this case. The first judgment of conviction, which was entered on February 8, 1974, was reversed by this

Court on August 7, 1974 (501 F.2d 1356) and the case was remanded to the District Court to hold a hearing to determine whether the Government complied with the Eastern District's Rule 50(b) Plan for Achieving Prompt Disposition of Criminal Cases (the "Plan"). That hearing was held on October 1 and 2. Following the hearing, the District Court determined that the Plan had been complied with and refused to dismiss the indictment.

On this appeal, appellant contends that the District Court, in determining the Government's compliance, exceeded the scope of this Court's mandate. Appellant does not claim that the Government failed to comply with the Plan.

Statement of the Case

(1)

Appellant was arrested on September 28, 1972 at John F. Kennedy International Airport on a charge of having smuggled two kilograms of cocaine into the United States (See T. 45-49; Magistrate's Complaint [72 M 1842], dated September 29, 1972; H. 85-88).* His arrest, as well as the arrest of his companion, Fernando Montane, followed, by about an hour, the arrest of one Raimundo Canas who was found in actual possession of the narcotics when he arrived that evening at the airport from Santiago, Chile (*id.*).** Although appellant had been the subject of an ongoing investigation by federal drug agents, his arrest for the crimes herein was primarily predicated on information supplied by Canas shortly after he was arrested (See Affidavit of Robert L. Clarey, pp. 1-2; Affidavit of John Daniocek, pp. 1-2 [both dated October 10, 1973]; H. 79-88).

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* Page numbers in parenthesis preceded by the letter "T" refer to the trial transcript. Page numbers preceded by the letter "H" refer to the hearing held on October 1 and 2, 1974.

** At the time of his arrest, Canas was masquerading under the name of "Rolando Sanchez", a name supplied to him by the defendant (T. 89-90).

Following his arrest and in discussions with Government representatives, Canas fully implicated appellant in the commission of the crime. He refused, however, out of fear of appellant, to testify in open court against him (See Affidavit of John Daniocek, p. 2). On February 23, 1973, some five months later, following Canas' conviction and after further unsuccessful attempts to gain Canas' in-court testimony, the Government dismissed the complaint against appellant (See Affidavit of Robert L. Clarey, p. 2).*

In May of 1973 Canas finally agreed to fully cooperate with the Government and to testify in the Grand Jury against appellant (*id.*, at p. 3). Thereafter, on June 19, 1973, appellant was indicted along with two other men, Carlos Hidalgo and Miguel Vera, both of whom were then and are now fugitives (H. 134).

On June 27, appellant was arrested at his home in Kearney, New Jersey, and the following day he was arraigned on the indictment before the District Court. Although no written Notice of Readiness was filed by the Government on the day of the arraignment, Mr. Clarey, the Assistant United States Attorney stated to the Court:

> Mr. Clarey: Your Honor, I will represent that the government is ready to try Humberto Flores immediately, although there are two fugitives in the case (Transcript of June 28, 1973, at p. 6; Government's Appendix, A. 6).

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* Canas was sentenced on January 8, 1973. He was represented at that time by Nancy Rosner, Esq., who was standing in for Canas' counsel, Elliot Taikeff. Ms. Rosner had previously represented the co-defendant Montane and Edmund A. Rosner, Esq., had represented the appellant. Mr. Rosner was associated in the practice of law with Ms. Rosner. Moreover, Ms. Rosner had acted as translator between Mr. Taikeff and his client, Canas (see Transcript of January 8, 1973 [72 Cr. 1152, E.D.N.Y.]. In addition, when Canas pleaded guilty on October 25, 1972, Ms. Rosner was the translator (see Transcript of October 25, 1972 [72 Cr. 1152, E.D.N.Y.]).

The Court then set September 19 as the trial date (*id.*). A formal Notice of Readiness was filed a month later on July 25, 1973.

On October 3, following an adjournment of the trial date to October 10, Court appointed counsel * for Flores moved for dismissal of the indictment upon the ground that "this matter has been *pending* against [the defendant] for over six (6) months in contravention of Rule 4 of the Second Circuit Rules regarding prompt disposition of Criminal Cases" [emphasis added] (See letter dated October 3, 1973, by Anthony G. Greco, Esq.).

On October 12, the parties appeared in court on the appellant's motion to dismiss. Previously, the United States had submitted two affidavits in opposition to the motion (See Affidavits of Robert L. Clarey and John Daniocek, dated October 10, 1973). In the main, those affidavits described the circumstance, previously described, that while appellant had been arrested on information supplied by Canas, the Government was unable to secure Canas' testimony because of Canas' fear of testifying. For that reason, the Government had stated, it was unable to present its case against appellant.**

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* While Nancy Rosner, Esq., represented appellant on the indictment, she was replaced by Anthony G. Greco, who first appeared in the case on September 17, 1973. Until that time, no motions had been made on behalf of the defendant Flores though the District Court had previously directed that the motions be "completed by August 31" (See Transcript of June 28, 1973, at p. 6, Government's Appendix, A. 6). On September 24, however, Mr. Greco wrote a letter to Mr. Clarey, the Assistant United States Attorney, requesting particulars and discovery. That letter was answered by Mr. Clarey the next day (Government Hearing Exhibits 1 and 2).

** In the portion of his affidavit denominated "Argument," Mr. Clarey urged (1) that "the new indictment" should "be regarded as an entirely new indictment and arrest within the meaning of Rule 4 of the Plan" and, therefore, that the starting point for the

[Footnote continued on following page]

At the argument of the motion on October 12, Mr. Clarey expressed the Government's desire to "submit an offer of proof at this time that this defendant was responsible for the failure to get Canas' testimony, the witness who will testify at the trial" (See Transcript of October 12, 1973, at pp. 10-11; Government's Appendix, A. 18-19). Finally, Mr. Clarey, to buttress that statement, offered to demonstrate, through testimony, that the appellant had, at the inception of the case, obtained counsel for

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filing of the Government's formal notice of readiness began on June 19, 1973; (2) alternatively, that the period between the dismissal of the complaint and the filing of the indictment ("3 months and 26 days") should be tolled and subtracted from the gross period of "9 months and 25 days" between the arrest and the filing of the Government's Notice of Readiness on "July 24, 1973," leaving a delay "of only 5 months and 19 [sic] days;" further in the alternative, (3) that the Government was entitled to the exception in Rule 5(c)(i) of the plan because evidence (Canas' testimony) was unavailable to the Government despite the exercise of "more than due diligence;" and further in the alternative; (4) that: "Another exception under Rule 5(d) and (e) is applicable by virtue of the defendant's fugitive status between June 19, 1973 and June 28, 1973 and for the period where the co-defendant Carlos Hidalgo was actively sought by agents from June 19, 1973 until July 24, 1973." The fifth and final argument advanced by Mr. Clarey was as follows:

> "At any rate under no circumstances can it be said on the facts of this case and considering the manner in which the Government has diligently proceeded, that the Government was guilty of any neglect whatsoever let alone the inexcusable neglect proscribed by Rule 4 of the Plan."

In response to these arguments, counsel for appellant argued that "this matter has been pending " . . . "for over six months in contravention of Rule 4 . . ." (Transcript of October 12, 1973, p. 4; Government's Appendix A. 12). In arriving at that conclusion, counsel argued that there were two periods of time chargeable against the Government: (1) the period of time between the arrest and the dismissal of the complaint, ". . . five months less three days" (*id.*, at 6; Government's Appendix A. 14); and (2) the period between the indictment and September 17 (when counsel first appeared in the case), "a period of altogether which would be eight months and about three days—" (*id.*).

the witness Canas (*id.*, at p. 11; Government's Appendix, A. 19). In response, the District Court stated that it would receive that evidence, "[i]f the court feels the evidence is necessary" (*id.*, at p. 11A; Government's Appendix, A. 20).

By its Memorandum and Order of October 15, 1973, the District Court obviated the need for the testimony proffered by the Government for, in its decision, the District Court determined that the Government's obligation to signify its readiness began on June 19, 1973 (See Memorandum and Order dated October 15, 1973; Government's Appendix, A. 27). In its decision, the District Court did not rely on the unrebutted evidence of Canas' fear but determined, instead, that the dismissal of the complaint, pursuant to Rule 48(a), F.R.Cr.P., had been without prejudice to reindictment, reasoning further that "there is no provision in the district's plan that provides for inclusion of a period of detention unrelated to the current charges pending against a defendant," the District Court rejected appellant's argument that the period of concern began with the day of his arrest, September 28, 1972.*

Appellant's trial was begun on the day following the District Court's determination that the Plan had not been transgressed. On February 8, 1974, appellant was sentenced. Thereafter, The Legal Aid Society was assigned to represent appellant on his appeal (Docket No. 74-1186).

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* It should be noted that at no time, under the numerous theories advanced by the parties and the District Court, was the precise date upon which the Government signified its readiness under the Plan ever a subject of concern, much less argument.

(2)

In his first brief to this Court, appellant argued that, despite Canas' alleged fear of testifying, there was a "judicial procedure to compel his testimony prior to the expiration of the six month period [following appellant's arrest]" (Appellant's Brief [74-1186], p. 13). Relying upon this Court's opinion in *United States* v. *Sanchez,* 459 F.2d 100 (2d Cir.), *cert. denied,* 409 U.S. 864 (1972), he urged that the Government could have obtained a court order to compel Canas' testimony. Then, characterizing Canas' refusal to testify as "unjustified," appellant urged that Canas would then have been held in contempt (*id.,* at 15). For that reason, appellant urged that Canas was not "unavailable" within the exception provided for in Rule 5(c)(i) of the Eastern District Plan and, moreover, relying upon *Hilbert* v. *Dooling,* 476 F.2d 355 (2d Cir. *en banc*), *cert. denied,* 414 U.S. 878 (1973), that the Government could not, under the Plan, unilaterally terminate a prosecution in order to "subvert the purpose of the Rules; . . ." (*id.* at 16).

The final paragraph of the brief (p. 19) stated as follows:

> In conclusion, the Government violated the six-month rule by failing to follow the procedure for obtaining testimony from a reluctant witness. Had the Government followed *United States* v. *Sanchez, supra,* rather than relying on extraordinary promises, Canas' testimony could have been compelled in sufficient time to satisfy the speedy trial rules [footnote omitted].*

The answering brief of the United States relied solely upon what was apparently conceded from the record and,

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* Appellant did not urge the position that he had in the District Court; to wit: That the total "pending" period of the charges exceeded six months.

as well, in appellant's brief: The unrebutted allegation that appellant was responsible for Canas' fear of testifying and the Government's consequent inability to produce him as a witness. Relying upon the "unavailable evidence" exception in Rule 5(c)(i) and the "exceptional circumstances" exception in Rule 5(h) of the Plan, the United States urged that the seven month period during which Canas was afraid to testify, was an excludable period under the Plan. Given the exclusion of that period, which ended in May, 1973, the Government urged that the Notice of Readiness, filed less than three months later on July 25, was sufficient compliance with Rule 4 of The Plan.*

(3)

In its *per curiam* opinion (501 F.2d 1356), the Court of Appeals reversed the judgment and rejected the Government's argument that the period during which Canas refused to testify was a period not to be considered under the readiness requirement of the Plan and held therefore that the Government was not ready for trial for a period in excess of six months.

The panel held that the period from appellant's arrest until the dismissal on the complaint (September 28, 1972 to February 23, 1973) was not excludable nor was the period between the indictment and the filing of the Notice of Readiness an excludable period (June 19, 1973 to July 25, 1973). Though the panel found the time between those periods to be excludable, it nevertheless found that the total period of delay exceeded six months. The panel, however, remanded the case for a determination as to whether

* The Government did not adopt the reasoning of the District Court which computed the period from June 19, the date of the indictment. Instead, it relied on the main factual position it had advanced in the District Court on October 12 and in the affidavits of Clarey and Daniocek to wit, that Canas was in physical fear of appellant. The Government, also, did not advance the myriad alternatives which it had urged in the District Court.

the nine day period between the indictment and appellant's arrest was an excludable period by virtue of appellant's apparent unavailability and whether that fact, if shown, affected the Government's readiness to go to trial. If not shown, the District Court was directed to dismiss the indictment. In making the remand, the Court of Appeals, noting the public's interest, stated that ". . . it is not improper to give the Government a second opportunity to establish its compliance with the Plan" (501 F.2d at 1360 n. 4).

(4)

At the hearing on the remand, the Government initially brought to the District Court's attention the June 28, 1973 transcript (Government's Appendix, A. 1) showing the oral notice of readiness by Mr. Clarey. Government counsel explained that the transcript had not been prepared until more than a month after the decision by the Court of Appeals and that, therefore, it had never been before the Court (H. 4-7, 11). Counsel also argued that "oral notice of readiness" was proper, citing the decisions in *United States* v. *Pierro,* 478 F.2d 386, 389 (2d Cir. 1973) and *United States* v. *Masullo,* 489 F.2d 217, 224 (2d Cir. 1973), and, further argued, that a memorandum dated March 20, 1973, from Chief Judge Mishler to the United States Attorney had endorsed oral notification as the preferred procedure in the Eastern District (See Memorandum of Chief Judge Mishler, Government's Appendix, A. 7 and Court's Hearing Exhibit 1, covering memorandum to "All Assistants, Criminal Division," dated March 23, 1973, Government's Appendix, A. 8). For the foregoing reasons, counsel urged that the Government had complied with the Plan, "well within the calculations of the six months as stated by the Court of Appeals . . ." (H. 5).

In addition, recognizing that the case would be "going up to the Court of Appeals again" (H. 21), Government counsel urged the District Court to allow the Government

to develop a "full record" on the reasons for Canas' fear as that record might bear on (1) other exceptions in the Plan, apart from Rule 5(h); and (2) excusable neglect under Rule 4. Finally, the Government urged that the Plan was unconstitutional to the extent that it mandated dismissal of indictments with prejudice (H. 21-23).*

In response, counsel for appellant urged that the Court was "precluded by [the] doctrine of the law of the case" from considering anything apart from "the availability or non-availability of the defendant for the nine days in question" (H. 25). In turn, the Government urged that the doctrine of the law of the case, while "binding between co-equal tiers in the judiciary," did not bind the Court of Appeals. Therefore, because it would be "ridiculous to present half a record in the case" to the Court of Appeals, it urged the District to hear the entirety of the evidence (H. 31-H. 32). Counsel stated:

> "If your Honor decides that certain of the arguments that the Government advances are precluded, well and good. At least we will have the opportunity to raise them in the Court of Appeals" (H. 32).**

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* The Government's argument with respect to the constitutionality of the Plan was contained in a Memorandum of Law, dated September 26, 1974, and submitted prior to the hearing.

** Government counsel had previously conceded that "There is a lingering question in this case as to whether or not your Honor can . . . consider these minutes [referring to June 28 transcript] discovered subsequent to the Court of Appeals' decision" (H. 18). In the same breath, however, counsel stated that the Government's initial "offer of proof as to Canis' [sic] fear in justification" of the delay in filing a notice of readiness had been rendered moot by the District Court's decision which made it "unnecessary to justify all that had occurred prior to June 19" (H. 20). It was equally immaterial, under that decision, if the Government had signified its readiness sometime before July 25.

Thereafter, appellant called several witnesses each of whom testified, in varying degrees, that between June 19 and June 28 appellant either was at home or in his luncheonette in Kearney, New Jersey. The Government, in turn, stipulated to that fact (H. 134).

The Government's evidence—which was tendered initially as going as well to the issue of excusable neglect (H. 78)—was tendered through John Daniocek, the agent most familiar with the investigation of appellant's drug activities. After Daniocek traced his early investigation of appellant, prior to the September 28 arrest (H. 79-H. 84), and he explained that when he was alerted to appellant's detention at JFK International Airport, he went there immediately (H. 85-H. 86). He initially interviewed Canas and, though Canas would not speak with him, he did point out appellant's name:

> At this time I asked Mr. Canis [sic] to whom he was bringing the cocaine. At this tme Mr. Canis [sic] would not answer me. He however reached on the table where there was a spiral notebook, he opened it, ruffled through the pages to a particular page and handed me the book where I would be able to read the name. The name was Humberto Flores at the Kearney number (H. 86-86a).

Thereafter, Flores was placed in custody by Daniocek (H. 87).

The remainder of Daniocek's testimony was then curtailed by the District Court following appellant's objection. In brief, during a lengthy colloquy (H. 89-H. 105) the District Court refused to either hear testimony or an offer of proof by the Government as to the appellant's responsibility for Canas' refusal to testify or any evidence which might bear on the issue of excusable neglect. Instead, the District Court directed the Government to confine the

witness Daniocek's testimony to the "fugitive" status of appellant (H. 106-H. 107) and, in that regard, limited strictly to what Daniocek and other agents did during that period of time to bring about the arrest of appellant (H. 108, H. 111, H. 116).

(5)

In its decision, the District Court determined that appellant was not a fugitive "during the period in question." Nevertheless, because of the oral notice of readiness of June 28, 1973, it determined that, "there being no evidence of bad faith," the Government had "complied with both the letter of and the policy underlying Rule 4." The District Court, accordingly, held that the indictment should not be dismissed.

ARGUMENT

POINT I

The District Court properly considered the June 28 oral notice of readiness and properly refused to dismiss the indictment.

Appellant contends that this Court's first decision in this case, in effect, froze all of the facts mentioned in it and the legal conclusions flowing therefrom. Thus, aside from the familiar "law of the case" doctrine, he urges the adoption of a "facts of the case" doctrine. All that, he urges, is what is meant by such cases as *Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964) which hold that a district court—or any inferior court— has no power to disobey the mandate of a higher court.

The Government believes that "law of the case" is essentially a doctrine based upon the policy of finality. As such, its application to any set of circumstances should depend, much as with the doctrine of res judicata, upon whether the parties have had a full opportunity to treat, in an adversarial context, the factual and legal issues which are involved. Moreover, even assuming that such a full opportunity has been had, policies stronger than that embodied in the doctrine should be found preeminent. In this case, the Government believes, given the severely truncated posture of this case when it first came to this Court as well as the "public interest" embodied in the Plan for Achieving Prompt Disposition of Criminal Cases, that the District Court was not precluded from finding that the Government had complied with the readiness requirement of the Plan. Alternatively, even if this Court should determine that the District Court was so precluded, it is clear, under this Court's recent decision in *United States* v. *Fernandez*, — F.2d — (2d Cir. Slip opinions, 281; decided November 6, 1974), that this Court may, under new facts, revise its initial view of the case.

(1)

The record of this case, before it reached this Court for the first time, shows that neither the District Court, nor the parties, anticipated that Rules 4 and 5 of the Plan could be interpreted in this case in such a manner as to require hairline computations respecting the date upon which the Government filed its notice of readiness or otherwise advised the District Court that it was ready. This Court's bifurcation of the gross period of some nine months, a bifurcation which for the first time reduced the central issue in the case to one of counting days, had not been presaged by any previous decision of this Court much less than by the parties. Indeed, the contention closest in theory to that approach, made by appellant's assigned counsel in the District Court was rejected not only by the

District Court, but by new appellate counsel for appellant as well.* Certainly, the District Court's opinion, which computed the readiness period from June 19th made unnecessary any factual inquiry as to when the Government had indicated its readiness, for the trial itself was begun within four months of the indictment. Finally, appellant's new counsel on appeal never argued any construction of the Plan which would have necessitated further factual inquiry into when the United States Attorney had signified his readiness. Perforce, the Government, in its preparation for the appeal, never anticipated the need, as it did after the decision, to scrutinize the record in the case between June 19th and July 25th. In sum, paraphrasing the language in *Zdanok* v. *Glidden, supra* at 949, it cannot be said, as in that case, that the issue of when the Government signified its readiness "was tried . . . as fully as the parties wished." In fact, it was never tried at all because it was never an issue. July 25th, therefore, the date on which the written notice of readiness was filed and present in the record for all to see, was—until this Court's decision—an utterly insignificant fact in the case which was hardly the subject of contention. Thus, it can hardly be said that the discrete issue of when the Government signified its readiness was "before this court," *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895), except in the narrowest sense.

The irony of this Court's first decision—in terms of the policy of finality—was not only reflected in the factual

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* Mr. Greco sought to combine two periods: (1) September 28, 1972 to February 23, 1973—the pendency of the first arrest and the complaint; and (2) June 19, 1973 to September 17, 1973—the date of the indictment until the day when he first appeared in the case. Mr. Greco, however, utterly misconstrued the Plan as requiring a trial as opposed to requiring a notification of readiness by the Government. His contention simply was that the charges had been "pending" in excess of six months. Appellate counsel completely abandoned that argument.

issue which it created, but, as well, in the factual issue it seemingly laid to rest. Aside from the purely legal contentions advanced in the District Court, the Government's main factual position in the District Court was that Canas, who provided the predicate for appellant's arrest on September 28, had not testified out of fear and that appellant was responsible for that fear. While in the District Court that position never went beyond the affidavit and oral argument stage, it was such a compelling position—even in its limited form—that appellant's first brief was almost entirely devoted towards showing that, because Canas could have been "compelled" to testify by the Court, his fear was neither an excludable period nor an exceptional circumstance under the Plan. The responding brief of the Government urged that the notion of compelling Canas to testify was absurd; that his fear made him unavailable as a witness under Rule 5(c)(i) or, alternatively, that his fear was an exceptional circumstance under Rule 5(h). This Court's first decision, however, made no mention whatever of the fact of Canas' fear nor the Government's allegation that appellant was responsible for inducing that fear. In short, it bypassed that which the advocates had, with near exclusivity, focused upon in their briefs and dismissed the Government's contention as "frivolous" (501 F.2d at 1360).

Hindsight, of course, traces the position of the Court to the absence of any hearing in the District Court on the issue of Canas' fear. Under that circumstance it can hardly be said that the issue of Canas' fear was, under the law of the case doctrine, forever foreclosed by this Court's first decision. Indeed, considering that the Government's initial offer of proof on that issue was coopted by the District Court's decision, it would work a manifest injustice to so preclude the Government.

It can be seen, therefore, that what came to be the two central and factual issues of the case were never litigated by the parties. Moreover, from the standpoint of their

legal effect, the parties had not—certainly, without fault or bad faith—addressed themselves to those issues prior to this Court's first decision. Under those circumstances, it must be said, that this Court's first opinion ". . . referred to facts and merits, as distinguished from the question of law . . . only as a setting to show what the question of law really was" *Gandia* v. *Porto Rico Fertilizer Co.*, 2 F.2d 641 (1st Cir. 1924). As such, those facts and merits (or, more properly, lack of merits) should not have been inexorably continued by the District Court to work a "manifest injustice" *Milwaukee and Minnesota Railroad Co.* v. *Stoutter,* 69 U.S. 510, 520 (1864). Accordingly, the District Court, while it improperly refused to hear the Government's proof on Canas' fear as that proof might have shown an excludable period under either Rules 5(c)(i) or 5(h) of the Plan, properly considered the dispositive effect of the June 28 oral notice of readiness.

(2)

In remanding the case to the District Court, this Court reached out for an issue which had not been urged by the Government on the appeal. In so doing, this Court stated (501 F.2d at 1360 n.4):

> ". . . we remand for further hearings because the Plan was not established primarily to safeguard defendants' rights. Rather the Plan, and the Second Circuit Rules before it, were to serve the public interest in the prompt adjudication of criminal cases. Thus, because it is not the defendant's personal interest being defended by the Plan, but rather the public's, whose interest is both in convicting criminals and in upholding the Plan, we feel it is not improper to give the Government a second opportunity to establish its compliance with the Plan.

In short, the public interest compelled this Court to expressly delineate one issue which arose from the Court's main rationale and which, if resolved in favor of the Government, would have established the Government's compliance. Certainly, the remand to the District Court was not intended to be read to the exclusion of the language in the footnote, quoted above, which explicitly gave to the Government "a second opportunity to establish its compliance with the plan." As such, it was proper for the District Court, in considering the scope of the remand, to consider a previously unknown fact (the oral notification of readiness) which so clearly established the Government's compliance with the Plan.*

(3)

Even if this Court should consider that the District Court was bound to follow the remand of this case, as framed in the textual portion of the opinion, it is clear that this Court may, in its discretion, revise the previous "law of the case." *United States* v. *Fernandez, supra.*

In *Fernandez*, this Court, in a previous decision, had determined that the defendant was not entitled to the identity of two informant witnesses who had identified an-

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* The "public interest" in seeing a full and complete resolution of factual and legal issues concerning the Plan and its predecessor, the Second Circuit Rules, is illustrated in the two decisions by this Court in *United States* v. *Rollins*, 475 F.2d 1108 and 487 F.2d 409. In *Rollins* I the remand to the District Court was limited, by its terms, to the issue of whether the Government's delay was justified by "exceptional circumstances." On the remand, however, the District Court determined, after a hearing, that the reason for the delay fell within the "unavailability" exception in Rule 5(c)(i). In *Rollins* II, this Court, without any discussion of the law of the case doctrine, treated the merits and determined that the unavailability of the witness was, as it had originally determined, an "exceptional circumstance" not requiring a previous request for a continuance.

other person as the perpetrator of the bank robbery with which Fernandez was charged. That determination had been reached following three trials and a full airing of the respective contentions by the defendant and the Government. Thereafter, in preparation for a fourth trial of the defendant, District Judge Weinstein, "upon learning certain facts not before this court on the prior appeals, ruled that disclosure was necessary, . . ." (slip op. at 283). While holding that Judge Weinstein had no power to change the law of the case as it had been stated in the earlier decision, this Court nevertheless stated:

> "Although the District Court may not change our mind for us, we may ourselves do so" (slip op. at 285).

Thereafter, upon its own review of the new facts before Judge Weinstein, this Court revised its previous view of the issue and remanded the case to the District Court for the purpose of allowing the District Court to direct the Government to disclose the identity of the informants upon pain of dismissal of the indictment.

While the *Fernandez* decision does not militate against the Government's main argument herein; to wit: that Judge Costantino properly considered the June 28 oral notification of readiness, it does suggest that, even if this Court were to hold otherwise, that it could, if it so chooses, revise its previous view of the case and allow the District Court, on further remand, to implement the effect of the oral notification. Such a course would be consistent with the public policy behind the Plan and provide a needed accommodation to what have emerged as the realities of this case.*

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* If this case is to be remanded to the District Court, and if the Court—for reasons not advanced by appellant, who does not challenge the sufficiency of the June 28 notice—should determine that the oral notification of readiness did not bring the Government into compliance with the Plan, the Government would

[Footnote continued on following page]

POINT II

The District Court improperly refused to entertain the Government's offer of proof on the issue of excusable neglect.

Rule 4 of the Plan provides, in pertinent part, that if the District Court should find no exceptions in Rule 5 applicable to justify the Government's delay in readying a case for trial, that:

> ". . . the court shall enter an order dismissing the indictment with prejudice *unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the Government is ready to proceed to trial within ten days*" [emphasis added].

In *United States* v. *Pierro*, 478 F.2d 386, 388 n. 1 (2d Cir. 1973) this Court stated that the Plan "compel[s] such an inquiry" by the District Courts. At the hearing in the District Court, however, every effort by the Government to tender an offer of proof on that issue was denied by the District Court (see e.g., H. 94-95, 97-98, 104) on the theory that the issue of excusable neglect was foreclosed by this Court's decision. That theory was entertained despite the fact that the District Court's initial decision on the motion obviated the need to treat such an issue and

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request that the scope of the remand be at least as broad as outlined in *United States* v. *McDonough*, — F.2d — (2d Cir. Slip opinions, 5615; decided October 3, 1974) and broad enough to allow the District Court to make inquiry into the reasons for Canas' fear of testifying; a fear which the Government has consistently maintained was the responsibility of appellant. Moreover, the remand should be broad enough to allow the Government to offer evidence that the delay in filing the notice of readiness was due to the unavailability of the co-defendants Hidalgo and Vera, "as to whom the time for trial" had not run, Rule 5(e).

despite the fact that this Court's decision made no determination on the issue of excusable neglect.

The Government submits that even if the facts and law of this case are to be confined strictly to the parameters of this Court's first decision and even if this Court should further decline to exercise its allowable discretion as set forth in *United States* v. *Fernandez, supra,* and thereby revise the law of this case, the Government cannot be deprived of an opportunity to demonstrate that its neglect was, nonetheless, excusable. Indeed, to hold otherwise would, in effect, penalize the Government for having initially prevailed in the District Court.*

POINT III

The Eastern District Plan is invalid.**

In the event that this Court should reject the arguments of the United States advanced in Points I and II, *supra,* it would appear that the issue of dismissal of the indictment would be ripe for determination by either this Court or the District Court. Any such dismissal would, we assume, be with prejudice against reindictment as provided for in Rule 4 of the Plan. The United States, however, believes that the Plan is invalid and can, therefore, provide no authority for such a dismissal.

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* In *United States* v. *Bowman,* 493 F.2d 594, 598 (2d Cir. 1974), where the delay was six months and five days, compared with six months and three days in this case, see *United States* v. *McDonough, supra,* slip op. at 5617 n. 3, this Court, upon a full record, itself determined that the neglect was excusable and relied upon the minimal delay involved. Certainly, where the record is not complete, the issue of excusable neglect should not thereby be lost.

** The following argument has been adopted from the brief of the United States in *United States* v. *Furey,* Docket Number 74-2266, a case which is currently pending before this Court on appeal and which is scheduled for oral argument on Friday, November 22.

A. Introduction

The Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases was adopted pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure which provides in pertinent part:

> To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself, and sentencing must take place, means of reporting the status of cases, and such other matters as are necessary or proper to minimize delay and facilitate the prompt disposition of such cases. The district plan shall include special provision for the prompt disposition of any case in which it appears to the court that there is reason to believe that the pretrial liberty of a particular defendant who is in custody or released pursuant to Rule 46, poses a danger to himself, to any other person, or to the community. The district plan shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of the district court may designate. If approved the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States. The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. * * *

Rule 50(b) was promulgated by the Supreme Court pursuant to Title 18 United States Code, § 3771, which authorizes the Supreme Court "to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict * * * ". These rules, which have the force and effect of law, take effect ninety days after they have been reported to Congress by the Chief Justice.

Our submission that the Eastern District Plan is invalid rests upon three separate bases. First, we believe it plain, that Rule 50(b) is not "a rule of pleading, practice, and procedure" and is therefore an invalid exercise of the rule-making power vested in the Supreme Court by Section 3771 of Title 18. Second, to the extent that it purports to authorize the district court to create defenses to charges of criminal violations of the United States Code merely because of the passage of an arbitrary period of time, it unconstitutionally usurps the powers which the constitution vests in the Congress and the President. Third, there is substantial support for the view that Rule 50(b) was never intended to authorize the dismissal of indictments with prejudice.

We recognize, of course, that Rule 50(b) was promulgated by the Supreme Court and it should not lightly be presumed that the Supreme Court would knowingly promulgate a rule which did not conform with Section 3771 or the Constitution. But the Supreme Court has admonished that the mere fact that it "promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." *Mississippi Pub. Corp.* v. *Murphee*, 326 U.S. 438, 444 (1946); see also, *Pabellon* v. *Grace Line*, 191 F.2d 169, 179, n. 5, concurring opinion of Frank, *J.* (2d Cir.), *cert. denied*, 342 U.S. 893 (1951). Accordingly, we proceed to our consideration of the validity of Rule 50(b) and the Eastern District Plan which was adopted pursuant to it.

B. Rule 50(b) is invalid because it does not conform with the rules enabling act

Rule 50(b) is not "a rule of pleading, practice and procedure" within the meaning of Section 3771; instead it purports to establish a mechanism for the adoption of such rules by the district courts subject to review by the several circuit councils. In so doing, it amounts to an improper delegation by the Supreme Court of its rule-making function; and it eliminates altogether the important power reserved by Congress in Section 3771 "to examine proposed rules, laws and regulations before they become effective * * * to make sure that the action under the delegation [of rulemaking authority] squares with the Congressional purpose". *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15 (1941). Rather than Congress exercising prior review of the rules promulgated by the Supreme Court, the Circuit Council sits to review procedural rules adopted by the district courts. This is clearly contrary to the provisions of Section 3771 and the regimen which Congress prescribed for the adoption of the Federal Rules of Criminal Procedure and subsequent amendments.

C. The Eastern District Plan is invalid because its formulation of a dismissal with prejudice sanction exceeds the scope of the judicial rule making power

The more basic objection to the Eastern District Plan, and to its predecessor—the Speedy Trial Rules promulgated by the Circuit Council—is that it intrudes upon the legislative powers vested in the Congress, and that it deprives the President altogether of the significant role in the legislative process which the Constitution vests in the Executive Branch. Quite plainly, had Congress chosen to legislate a plan similar to the Eastern District Plan, it could have done so (over the objection of President) only by two-thirds vote of both the House and Senate. Yet,

by doing nothing for ninety days after the Supreme Court promulgated Rule 50(b), Congress has in effect deprived the President of any legal role in the adoption of a major piece of legislation.

We emphasize here that we do not argue that Congress may not delegate to the Judicial Branch the authority to formulate procedural rules to facilitate the exercise of the judicial powers; indeed, the Judicial Branch may possess the inherent power to formulate such rules. Our position, however, is that this power is not without its limitations; and that those limitations are breached when, a "procedural rule" is promulgated which marks a break with settled substantive law and involves the kind of policy determination which ought to be made by Congress and the Executive Branch. This distinction was best stated by Mr. Justice Brandeis in *Washington-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 635-36 (1924):

> The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred."

The Eastern District Plan, as well as its predecessor, goes well beyond the traditional scope of rules of practice and procedure.*

First, it marks a substantial break with the well-settled substantive rule that, except where the Speedy Trial Clause has been violated, a dismissal with prejudice is an "unsatisfactorily severe remedy" because in practice, "it means that a defendant who may be guilty of a serious crime will go free without having been tried". *Strunk* v. *United States*, 412 U.S. 434, 439-440 (1973), quoting *Barker* v. *Wingo*, 407 U.S. 514, 522 (1972). Indeed, until the adoption of the Circuit Council Speedy Trial Rules, the dismissal of an indictment with prejudice merely because of the passage of a specified period of time was totally unprecedented. While it has been suggested that at common law, a district court possessed inherent power to dismiss an indictment for unnecessary delay in prosecution (F.R. Cr. P., Rule 48(b), Advisory Committee Notes), the only case cited in support of that assertion, *Ex Parte Altman*, 34 F. Supp. 106 (S.D. Cal. 1940), demonstrates that, to the extent such an inherent power was recognized, it was limited to dismissal *without* prejudice.** Thus in *Ex Parte Altman, supra*, the issue was whether a district court had the power to vacate

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* *Hilbert* v. *Dooling*, 476 F.2d 355 (2d Cir., *en banc*) *certiorari denied*, 414 U.S. 878 (1973), did not involve the issue of whether the Circuit Council Rules were constitutionally infirm. Rather it dealt with whether the Circuit Council had the power under T. 28 U.S.C., § 332 to promulgate them. While we continue to adhere to the view that Section 332 confers no such power (see, Korman *Introduction to Second Circuit Review—Civil Procedure*, 40 *Brooklyn L. Rev.* 947-952), the holding in that case is not dispositive here.

** There is reason to doubt that any such inherent power existed at all. Compare *Frankel* v. *Woodrough*, 7 F.2d 796, 798 (8th Cir. 1925); *Daniels* v. *United States*, 17 F.2d 339 (9th Cir. 1927); *Fowler* v. *Hunter*, 164 F.2d 668 (10th Cir. 1947); *Miller* v. *Overholser*, 206 F.2d 415 (D.C. Cir. 1953).

an order which it had previously entered dismissing an indictment for failure to prosecute. The district court held that such action was proper "unless the act has acquired a finality which is beyond the court's reach" (34 F. Supp. at 108). Concluding that a dismissal for failure to prosecute was not such a final order, the district court summarized the consequences of a dismissal for want of prosecution (34 F. Supp. at 108-109, emphasis added):

> * * * [T]he order of dismissal [for want of prosecution] was neither a judgment nor was it final. A dismissal or nolle prosequi does not work an acquittal. *Dealy* v. *United States*, 1894, 152 U.S. 539, 543 * * *; *Meyers* v. *United States*, 3 Cir., 1929, 36 F.2d 859, 861; *Cochran* v. *United States*, 8 Cir., 1930, 41 F.2d 193, 207; *Miller* v. *United States*, 9 Cir., 1931, 47 F.2d 120. *Or bar a second prosecution for the same offense.* *Wolff* v. *United States*, 1 Cir., 1924, 299 F. 90. It does not constitute jeopardy. *United States* v. *Percansky*, D.C. Minn., 1923, 298 F. 991. Nor is it an appealable order. *Lewis* v. *United States*, 1910, 216 U.S. 611 * * *. (Emphasis added.)

This holding reflects the settled principle that "[a]t the common law and in the absence of special statutes of limitations the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the Government or the failure of the grand jury to indict" within a reasonable time after arrest. *United States* v. *Cadaar*, 197 U.S. 475, 478 (1905); *United States* v. *Marion*, 404 U.S. 307, 317 (1971).*

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* In *United States* v. *Cadaar*, *supra*, the issue presented was whether a statute, which provided that if any person "charged with a criminal offense shall have been committed or held to bail" the grand jury must act within a specified period of time or the accused would be set free (D.C. Code § 939, 31 Stat. 1342, now

[Footnote continued on following page]

Moreover, while it is true that under Rule 48(b), a dismissal for unnecessary delay may be with or without prejudice (*Hilbert* v. *Dooling, supra*). Rule 48(b) has been construed uniformly to authorize a dismissal with prejudice only under circumstances where a defendant can demonstrate that he demanded a speedy trial and that he suffered prejudice to his right to a fair trial. *United States* v. *Favalaro,* 493 F.2d 623, 626 (2d Cir. 1974). As Mr. Justice Clark recently stated in writing for this Court (*United States* v. *Crutch,* 461 F.2d 1200, 1202 (2d Cir.), *cert. denied,* 409 U.S. 883 (1972):

> Since the delay here involved is not substantial, a dismissal [with prejudice] under Rule 48(b) can only be claimed upon some showing that the defendant has been or will be prejudiced.

Indeed, it seems clear that a dismissal with prejudice is mandated under Rule 48(b) only "where there is a finding that the Speedy Trial Clause has been violated." *Cohen* v. *United States,* 366 F.2d 363, 367 (9th Cir.), *certiorari denied,* 385 U.S. 1035 (1967); *Mann* v. *United States,* 304 F.2d 394, 397 (D.C. Cir.), *certiorari denied,* 371 U.S. 896 (1964); *United States* v. *Mark II Electronics of Louisiana, Inc.,* 283 F. Supp. 280, 284 (E.D. La. 1968); cf. *United States* v. *Apex Distributing Co.,* 270 F.2d 747, 750-751 (9th Cir. 1959); *United States* v. *DiStefano,* 464 F.2d 845, 849 (2d Cir. 1972); *United States* v. *Chase,* 372

D.C. Code § 23-102, 84 Stat. 605). A defendant who had not been indicted within the time specified asserted that any further prosecution for the same offense was barred. In rejecting the claim, the Court held (197 U.S. at 479, emphasis added):

> If it had been the purpose of Congress to work so *radical a change* in the law as to end the right of further prosecution for the offense, we think it would have used language apt for the purpose, and the failure so to do indicates the intention to deal only with delays in action by the grand jury against persons under arrest or bonds.

F.2d 453 (4th Cir.), *certiorari denied*, 387 U.S. 907 (1967). Accordingly, it is plain that under the applicable standards and rules of the United States, which expressly deal with the issue of speedy trials, a dismissal of the indictment in the instant case would not be warranted.

Second, in addition to the substantive change in the law effected by the provisions of the Eastern District Plan, the determination to afford the sanction of a dismissal with prejudice ultimately reflects a policy determination which should be made by the Legislative Branch. The purpose of the Eastern District Plan, and the Circuit Council Rules, is not to protect the right of the defendant to a speedy trial. Rather it was intended to further the "public interest" in the prompt disposition of criminal cases. *United States* v. *Flores*, 501 F.2d 1356, 1358 (2d Cir. 1974). Yet, we respectfully submit, the determination of whether the "public interest" in the prompt disposition of criminal cases should be vindicated by the sanction of a dismissal with prejudice involves a policy determination which belongs to Congress. Congress through the exercise of its legislative powers has decreed that this defendant—who has violated the United States Code—should be punished according to law; the determination reflected by the Eastern District Plan that he should be freed—in order to vindicate other policies, plainly overrules that legislative judgment. Our position, indeed, is best summarized by the Senate Judiciary Committee in its Report on S. 754, a bill intended to deal in a comprehensive fashion with the problem on insuring speedy trials. There the Senate Judiciary Committee observed (S. Rep. 93-1021, pp. 18-19):

> "Rule 50(b), the Second Circuit rules, and the various responses to both the district courts and courts of appeal elsewhere in the Federal system are significant contributions to the cause of speedy trial. However, at the same time, their effect upon the separation of powers between coordinate branches of

government should not be a subject of rejoicing by Members of Congress. For, in effect, the Supreme Court and the Second Circuit are doing what, under the Constitution, the Congress should be doing—legislating a solution to the problem of court delay. As Justice Douglas said in his dissent to the promulgation of Rule 50(b):

> 'There may be several better ways of achieving the desired result (speedy trial). This Court is not able to make discerning judgments between various policy choices where the relative advantage of the several alternatives depends on extensive fact-finding. That is a 'legislative' determination. Under our constitutional system that function is left to the Congress with approval or veto by the President' (406 U.S. 981)."

Moreover, even from a policy standpoint—as distinguished from a constitutional one—the legislative route towards realization of the speedy trial principle has manifold advantages. The thrust of the Eastern District Plan is restricted to delays caused by the prosecution. Since congested court dockets account for much, if not most, of the overall delay, the Eastern District Plan, due to its limited scope, falls short of addressing the broader problem of systemic delay in the administration of justice. A legislative solution, such as the proposed Speedy Trial Act of 1974, would provide the vital nexus between a speedy trial requirement and the appropriation process. By providing the mechanism for Congress to appropriate those additional resources necessary to fulfill the goals set by such a statute, a legislative scheme on the order of S. 754 would enable the entire federal criminal justice system to prepare for the gradual achievement of truly speedy trials. Without provision for more judges, prosecutors, public defenders and management technology, there is every likelihood that court congestion will retain its *de facto* ability to nullify speedy

trial rules. Under present circumstances, moreover, the practical effect of the dismissal with prejudice sanction of the Eastern District Plan is to confer arbitrarily a benefit of immunity on a particular class of defendants as a result of inadvertent and nonprejudicial prosecutorial delays when even a statement of readiness would probably not in fact accelerate the trials of those defendants. See e.g. *United States* v. *Infanti,* 474 F.2d 522, 528 (2d Cir. 1973); Cf. *United States* v. *Nazzaro,* 472 F.2d 302, 304 n. 2 (2d Cir. 1973).

D. Rule 50(b) was not intended to authorize the formulation of a rule providing for dismissal with prejudice

There is a serious question as to whether the Supreme Court intended to vest in the district court the power to fashion a remedy of dismissal with prejudice. Before officially releasing Rule 50(b), the Judicial Conference produced "a more substantive alternative" in the form of a draft amendment to Rule 45. See Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., Report on Speedy Trial Act of 1974, S. Rep. 93-1021 at 18. That amendment, which was not adopted, set exacting time limits for the several stages in the criminal process: a 90-day limit between arraignment and trial for detainees, and 180-day limit for released defendants. It bears attention that the failure to meet those time limits would not have necessitated dismissal with prejudice. As the Senate Judiciary Committee observed (id. at 18). "Evidently, the Judicial Conference chose the district plans approach embodied in Rule 50(b) because it provided greater freedom of choice for the individual district courts and because of a proper reluctance to adopt a substantive speedy trial rule through amendment of the Criminal Rules of Procedure. Understandably, the Judicial Conference left the consideration of such changes to the Congress where it properly belongs."

Rule 50(b) was approved in turn by the Supreme Court and by the Congress. Prior to this effective date, the Administrative Office of the United States Courts circulated a Model Plan for implementation of the Rule. Section 4 of the Model Plan deals with the effect of non-compliance with the time limits; it provides:

> "Upon the expiration of a time limit as prescribed by or extended under this rule, a defendant who is in custody shall be released from custody unless the Court finds that the defendant is responsible for the failure to comply with the time limits. Subject to the provisions of 18 U.S.C. § 3416, if the Court finds that a defendant who is not in custody is responsible for failure to comply with the time limits, such defendant may have his release revoked unless there is good cause shown for the failure to comply. *Subject to the power of the Court to dismiss a case for unnecessary delay* [*pursuant to Feedral Rules of Criminal Procedure Rule 43(b)*], *the failure to conform with the time limits herein prescribed shall not require the dismissal of the prosecution*" (emphasis added).

The Model Plan does not require or even suggest a mandatory dismissal sanction as is contained in the Eastern District Plan; nor, for that matter, does Rule 50(b) itself. In fact, the collective Second Circuit plans, by providing for dismissal with prejudice, place the district courts here in a rather small sample of federal jurisdictions where so stringent a penalty is specified. A. Cohen, Rule 50(b): Response of the District Courts, Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., at 229-31, 233.* Moreover, while the Advisory Committee notes to

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* An examination of 85 district court plans on file in the Administration Office for United States Courts (undertaken by

[Footnote continued on following page]

Rule 50(b) expressly refer to the Second Circuit Speedy Trial Rules, it must be emphasized that it was not until after Rule 50(b) was promulgated that this Court, in *Hilbert* v. *Dooling, supra,* "announced that dismissal under Rule 4 are with prejudice" (*United States* v. *Rollins,* 475 F.2d 1108, 1109 (2d Cir. 1973). Since the Circuit Council's rule did not state that dismissal with prejudice was mandatory, and since the Chief Judge of the Circuit and the able district court judge in *Hilbert* v. *Dooling,* did not so read the Council rules, the reference to the Circuit Council Rules in the Advisory Committee Notes to Rule 50(b) is plainly inconclusive.

In sum, it seems clear that, consistent with the doctrine separation of powers, the Supreme Court and the Congress did not intend Rule 50(b) to authorize dismissals with prejudice for prosecutorial non-compliance with the respective district court plans.

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the Department of Justice in 1973) indicated that 66 have adopted Rule 4 of the Model Plan without substantial change; 14 have adopted plans which provided in substance that the district court may take any appropriate action, including but not limited to dismissals for unnecessary delay under Rule 48(b); and 4 have adopted plans containing no provision at all. Only the District Court for the District of Massachusetts (outside the Second Circuit) provided for mandatory dismissal, although it does not indicate whether the dismissal shall be with prejudice.

Moreover, in the aforementioned study of the Rule 50(b) plans (*supra,* p. 14) by Andrew Cohn of the Yale Law School, it was recommended pointedly that "[a] dismissal without prejudice might serve as an intermediate alternative and might enhance the flexibility of judges seeking to enforce the time requirements in the plans." *Id.* at 233.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: November 12, 1974

Respectfully submitted,

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United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
Assistant United States Attorney,
*(Of Counsel)**

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* The United States Attorney's Office wishes to acknowledge the assistance of Harvey A. Herbert in the preparation of this brief. Mr. Herbert is a third year law student at Brooklyn Law School.

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Lydia Fernandez being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of November 1974 he served a copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

William Epstein, Esq.
Legal Aid Society
Federal Defender Services Unit
U. S. Courthouse
Foley Square, New York, NY 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

Lydia Fernandez

Sworn to before me this

15th day of November 19 74

Notary Public, State of New York
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976